



Agenda Date:04/22/03

Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

www.bpu.state.nj.us

OFFICE OF CABLE
TELEVISION

IN THE MATTER OF THE ALLEGED)
NON-COMPLIANCE BY RCN OF NY, A)
WHOLLY-OWNED SUBSIDIARY OF RCN)
CORPORATION, WITH THE REQUIREMENTS) ORDER
OF N.J.S.A. 48:5A-15, 16, 17 AND 22 REQUIRING)
MUNICIPAL CONSENT FROM THE CITY OF)
JERSEY CITY AND A CERTIFICATE OF APPROVAL) DOCKET NO. CC03010023
FROM THE BOARD FOR NEWPORT COMMUNITY)
IN JERSEY CITY, NEW JERSEY)

(SEE ATTACHED SERVICE LIST)

BY THE BOARD:

The New Jersey Board of Public Utilities ("Board") and its Office of Cable Television ("OCTV"), pursuant to N.J.S.A. 48:5A-1 et seq., have been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of Federal law. Pursuant to this authority, the within matter was opened to the Board upon receipt of information which the Board reviewed and on which the Board made preliminary findings of fact and conclusions of law, set forth by Order dated February 20, 2003.

These preliminary findings noted that RCN is the sole provider of video services to the residents of the Newport building complex via a satellite master antenna television ("SMATV") system, that the coaxial cables used to distribute that video system cross under two roads which have been dedicated to the public use, and that while a "non-exclusive utility easement" may exist, RCN did not have an ownership interest in the easement. As such, the Board found that the RCN SMATV System satisfies the Federal definition of a cable system and is subject to Board authority.

The preliminary Order indicated that it would become final, effective and binding on the 20th day following service unless RCN requested a modification or dismissal, in writing, which would include any and all reasons why the findings and conclusions should be modified or dismissed and any and all documents or other written evidence supporting RCN's request. Those submissions would be reviewed by the Board, and in the event the submissions

established a need, the Board would conduct further proceedings. If no material discrepancies were raised, or if the Board was not persuaded that the submissions merited further consideration, the Board would enter a Final Order. Finally, if nothing was submitted within the prescribed time frame, the preliminary Order would become a binding Final Order.

The preliminary Order was served upon RCN on February 26, 2003, and provided RCN with the opportunity to present argument and facts countering the preliminary findings. On March 18, 2003, within the time frame set forth by the Board, RCN submitted a response, seeking dismissal of the Order. This request for dismissal objected to the conclusion that RCN “uses” the public right-of-way such that the SMATV system falls under the definition of 47 U.S.C.A. § 522(7). Additionally, RCN claimed that the Board’s conclusion ran counter to the decision in Guidry Cablevision/Simul Vision Cable System v. City of Ballwin, 117 F.3d 383 (8th Cir. 1997). RCN did not submit any documents or written evidence supporting this claim.

The Board has reviewed RCN’s response and finds no material factual discrepancies have been raised. Therefore, the Board finds that no further proceedings are necessary in this matter and that the Board may render this Final Order based upon the information presented to the Board, including RCN’s response to the preliminary Order. Based thereon, the Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. RCN, a Pennsylvania corporation, is a wholly owned subsidiary of RCN Corporation and has corporate offices at 105 Carnegie Center, Princeton, New Jersey. RCN operates a SMATV system, under the fictitious corporate name of “RCN of New York,” in the Newport building complex in Jersey City, New Jersey.
2. The Newport building complex consists of Presidential Plaza, with four buildings and 1,504 rental units, the James Monroe complex with 443 units of condominiums, and the Towers of America, with five buildings and 1,600 residential units.
3. RCN provides video services to the residents of the Newport building complex through a SMATV system. In this system, signals are received via microwave from New York to a centrally located antenna. The video signal is then distributed via coaxial cable in two separate conduits to the remaining buildings in the complex.
4. These two conduits run under River Drive South and Newport Parkway. River Drive South was dedicated to the City of Jersey City pursuant to Ordinance No. 93-051, dated May 19, 1993 and Newport Parkway was dedicated to the City of Jersey City pursuant to Ordinance No. MCC-324, dated August 21, 1991.
5. The Ordinance language accepting the dedications provided that the roadways were accepted subject to any and all preexisting easements. A “non exclusive utility easement” exists for the River Drive South property, memorialized in a First Amendment to Declaration of Easement, Book 4386, Page 016, filed with the County of Hudson. This First Amendment to Declaration of Easement includes a provision indicating “No Third Party Beneficiaries.”
6. RCN has not provided any information to indicate that RCN is an owner, successor, assign, designee or nominee under the easement declaration.

7. Under Federal law, a SMATV system will not be considered a cable system provided it "serves subscribers without using any public right-of-way." 47 U.S.C.A. § 522(7).

CONCLUSIONS OF LAW

RCN, by virtue of running coaxial cables under River Drive South and Newport Parkway, uses the public right-of-way and is therefore a cable system under 47 U.S.C.A. § 522(7). Because RCN qualifies as a cable provider under Federal law, RCN falls under the jurisdiction of this Board, and must conform to the requirements of the New Jersey Cable Television Act, including the requirements of filing for a Certificate of Approval under N.J.S.A. 48:5A-17(a) and filing for municipal approval under N.J.S.A. 48:5A-22. This Board is not bound by the Guidry decision from the Eighth Circuit, and instead is convinced by the reasoning used by the Iowa Supreme Court in Mason City v. City Center of Mason City, Inc., 634 N.W.2d 667 (Iowa 2001), to reach the conclusion that two coaxial cable runs crossing under a public road is a sufficient use of the public right-of-way to qualify RCN as a cable system under 47 U.S.C.A. § 522(7).

Accordingly, based upon the foregoing, the Board HEREBY ORERS that:

RCN, within 60 days of the date of this Order, shall file a petition for a Certificate of Approval to operate in the Newport building complex as required by N.J.S.A. 48:5A-17(a) and file for municipal approval from the City of Jersey City as required by N.J.S.A. 48:5A-22. Such filings may be simultaneous, and the Board will reserve its decision on the Certificate of Approval until municipal consent is received or until RCN files under N.J.S.A. 48:5A-17(d) in the event that the City of Jersey City denies municipal consent.

DATED: 4/29/03

BOARD OF PUBLIC UTILITIES
BY:

(signed)

JEANNE M. FOX
PRESIDENT

(signed)

FREDERICK F. BUTLER
COMMISSIONER

(signed)

CAROL J. MURPHY
COMMISSIONER

(signed)

CONNIE O. HUGHES
COMMISSIONER

(signed)

JACK ALTER
COMMISSIONER

ATTEST:

(signed)

KRISTI IZZO
SECRETARY

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